STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Cooper, P.J. and Sawyer, and Owens, J.J.)

ANTONIO CRAIG, a Minor, by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL, a Michigan Corporation,

Defendant,

HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellant,

ASSOCIATED PHYSICIANS, P.C., ELLIAS G. GENNAOUI, M.D. and AJIT KITTUR, M.D., Jointly and Severally,

Defendants.
_____/

Supreme Court
No. 121405

Court of Appeals
No. 206859

Wayne County Circuit Court
No. 94-410338 NI

BRIEF FOR DEFENDANT HENRY FORD HEALTH SYSTEM

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI

SUSAN HEALY ZITTERMAN (P33392)
Co-Counsel for Henry Ford Health System
One Woodward Avenue, 10th Floor
Detroit, MI 48226
(313) 965-7905

KALLAS & HENK, P.C.

LEONARD A. HENK (P26651)
Attorney for Henry Ford Health System
43902 Woodward Avenue
Suite 200
Bloomfield Hills, MI 48202-0556
(248) 335-5450 Ext 229

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

STATUTES, COURT RULES AND OTHER AUTHORITIES

STATEMENT REGARDING JURISDICTION

This is a medical malpractice action in which plaintiff proceeded against five defendants, Dr. Gennaoui, Dr. Kittur, Associated Physicians, P.C., Oakwood Hospital and Henry Ford. Following a jury trial, on July 10, 1997, a judgment on the jury verdict was entered against Oakwood Hospital, Dr. Gennaoui and Associated Physicians, P.C. A judgment of no cause for action was entered in favor of Dr. Kittur. Defendants filed post-judgment motions for new trial, judgment notwithstanding the verdict and/or remittitur on August 7, 1997 pursuant to the July 10, 1997 order granting extension of time to file post-judgment motions. On September 12, 1997 the trial court issued an order and opinion finding Henry Ford the successor in interest to Associated Physicians, P.C. On September 19, 1997 Henry Ford Hospital timely filed a motion for rehearing.

By order of September 26, 1997, Judge Youngblood disposed of all post-judgment motions of all parties, and held Henry Ford liable for the July 10, 1997 judgment, jointly and severally with Oakwood Hospital, Dr. Gennaoui and Associated Physicians, P.C.

Henry Ford's claim of appeal was timely filed on October 14, 1997 within 21 days of the September 26, 1997 judgment and order.

Defendant's application for leave to appeal filed with this Court on April 25, 2002, within 21 days of the Court of Appeals' April 5, 2002 order denying rehearing of its February 1, 2002 opinion.

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE LOWER COURTS' IMPOSITION OF SUCCESSOR LIABILITY ON HENRY FORD, AFTER A ONE-HOUR BENCH TRIAL, WAS CONTRARY TO LAW AND POLICY, AND UNSUPPORTED BY SUFFICIENT EVIDENCE, REQUIRING JUDGMENT AS A MATTER OF LAW FOR HENRY FORD?

Defendant Henry Ford Health System submits the answer is "Yes."

Plaintiff asserts the answer it "No."

The trial court and Court of Appeals held the answer is "No."

II

WHETHER THE OPINION TESTIMONY OF PLAINTIFF'S EXPERT WITNESSES WAS NOT DEMONSTRATED BY PLAINTIFF TO BE RELIABLE UNDER MRE 702, AND/OR WAS BASED ON FACTS NOT IN EVIDENCE, WARRANTING JUDGMENT FOR DEFENDANTS NOTWITHSTANDING THE MALPRACTICE VERDICT?

Defendant Henry Ford Health System submits the answer is "Yes."

Plaintiff asserts the answer it "No."

The trial court and Court of Appeals held the answer is "No."

STATEMENT OF FACTS

Henry Ford Health System (hereinafter Henry Ford) appeals by leave granted from the published Court of Appeals opinion affirming the Wayne County Circuit Court's judgment against it of successor liability for a medical malpractice verdict of nearly $36 million (Appx 425a, opinion). Leave has been limited to these issues:

> (1) Whether the witness' testimony was based on facts not in evidence and whether the trial court erred in permitting the testimony of plaintiff's expert witnesses. See People v Young, 418 Mich 1, 21 n7 (1983).
> (2) Whether the trial court erred in finding defendant Henry Ford Hospital liable on a successor theory.

In 1997, a Wayne County jury found medical malpractice by co-defendants, Oakwood Hospital and Dr. Gennaoui during the birth of Antonio Craig in 1980 at Oakwood Hospital. Judgment on the jury verdict of more than $35 million was entered on July 10, 1997 against Oakwood Hospital, Dr. Gennaoui and Dr. Gennaoui's employer, Associated Physicians, P.C. (Appx 275a, judgment).

Henry Ford had no involvement with the birth of Antonio Craig or any of the malpractice issues. However, Judge Carole Youngblood following a one-hour bench trial on September 12, 1997 found Henry Ford to be the "successor" of Associated Physicians, P.C., and liable for the medical malpractice judgment (Appx 417a, opinion), and on September 26, 1997 ordered Henry Ford jointly liable for the medical malpractice judgment (Appx 422a, judgment).

The Court of Appeals, in its published decision, affirmed and held Henry Ford liable for the actions of Dr. Gennaoui and the multi-million dollar verdict by endorsing an unprecedented expansion of Michigan "successor liability" law to a professional services context, and then "stacking" theories of corporate "successor liability" (Appx, 425a

opinion). The Court of Appeals did so by extending successor liability (1) through transactions involving Associated Physicians Medical Center, Inc. and Dr. Gennaoui's employer, co-defendant Associated Physicians, P.C., which occurred in 1986, six years after the alleged malpractice, but years before any claim for malpractice was asserted, and (2) then through subsequent dissolution of Associated Physicians Medical Center, Inc., in 1993, to impose liability for the 1980 malpractice on Henry Ford (its shareholder) by a "de facto" merger. (Id.)

Underlying Medical Facts And Trial

Plaintiff Antonio Craig was delivered by Dr. Gennaoui at Oakwood Hospital on June 16, 1980 without apparent complication. Ms. Craig had been admitted to Oakwood Hospital that morning with spontaneously ruptured membranes. Because of the risk of infection after rupture, and because labor was not progressing, Dr. Gennaoui ordered that labor be induced or augmented by the use of the drug Pitocin at approximately 11:35 a.m. Throughout labor, contractions were monitored by physical palpation, and consistently recorded as mild to moderate (Appx 46a-50a medical records, Appx 66a-71a, 82a-84a, Gatewood T 11: 83-88, T 12: 9-10, 58).

The child was born at 6:41 p.m. by normal, spontaneous delivery without use of forceps or other forceful intervention. The relative sizes of the child and the mother's pelvis were such that there was no cephalopelvic disproportion; the child passed easily though the birth canal. The child appeared normal and healthy at birth, with no visible signs of injury or trauma whatsoever. He had "Apgars", a measure of fetal well-being at birth in terms of respiration, reflexes, color, etc., of 8 and 9 or 9 and 10, out of 10 possible, reflecting good fetal wellbeing. (Appx 56a-57a, 72a-74a, 78a-80a, Gatewood

T 10:110-111, T 11: 147, 154, 202, 208; Appx 197a-202a, Gabriel T 13: 126-131.)

The child's retardation and cerebral palsy did not begin to become apparent until after he reached three months of age (although in retrospect, plaintiff's causation expert, Dr. Gabriel, claimed to see some signs of neurological abnormality in the positioning of the child's eyes and hands in baby pictures taken shortly after birth). It was undisputed that there were many possible causes of brain damage with such disabilities, other than labor and delivery (Appx 76a-1, Gatewood T 11: 158).

However, at the malpractice trial and as detailed in Argument II below, it was plaintiff's theory that the child's brain damage was caused primarily by the consequences of an overdose of Pitocin, which plaintiff's expert theorized had occurred based upon one transposed entry in the medical records. Dr. Gabriel claimed that Pitocin caused excessively strong uterine pressures, which in turn caused the child's skull to pound or grind against a "bony protrusion" within the mother, which caused physical trauma to and compression of the brain, which caused mental retardation first noted three months later.

Successor Liability Facts And Trial

Following the medical malpractice trial, the issue of Henry Ford Health System's "successor" liability was tried by Judge Youngblood without a jury on August 12, 1997 (Appx 290a-335a, T 31). The proofs consisted of documents admitted upon stipulation of the parties (Appx 305a-311a, 315a-318a, T 31: 16-22, 26-29). Plaintiff produced no witnesses at trial, which lasted one hour, and consisted of primarily the arguments of counsel. Trial exhibits established the following.

At the time that the alleged Craig malpractice claim arose in 1980, Dr. Gennaoui

was employed by Associated Physicians, P.C. This was a medical professional corporation, which since 1966 had been organized under the Professional Service Corporation Act, MCL 450.221 et seq (which limits shareholder-owners to similarly licensed professionals). The P.C. had offices in Taylor, Michigan, where Dr. Gennaoui initially saw Kimberly Craig (see Appx 453a, 1986 Annual Report of Associated Physicians, P.C.).

In 1986, six years after the birth of Antonio Craig and the alleged malpractice, the owner physicians of Associated Physicians, P.C., although still desirous of continuing their medical practice, entered into negotiations with Henry Ford Health Care Corporation for performance of administrative and bookkeeping services for their medical clinic (Appx 355a, Affidavit of D. Share). (In 1989, Henry Ford Health Care Corporation became Henry Ford Health System; both are hereinafter referred to as "Henry Ford" for ease of reference.)

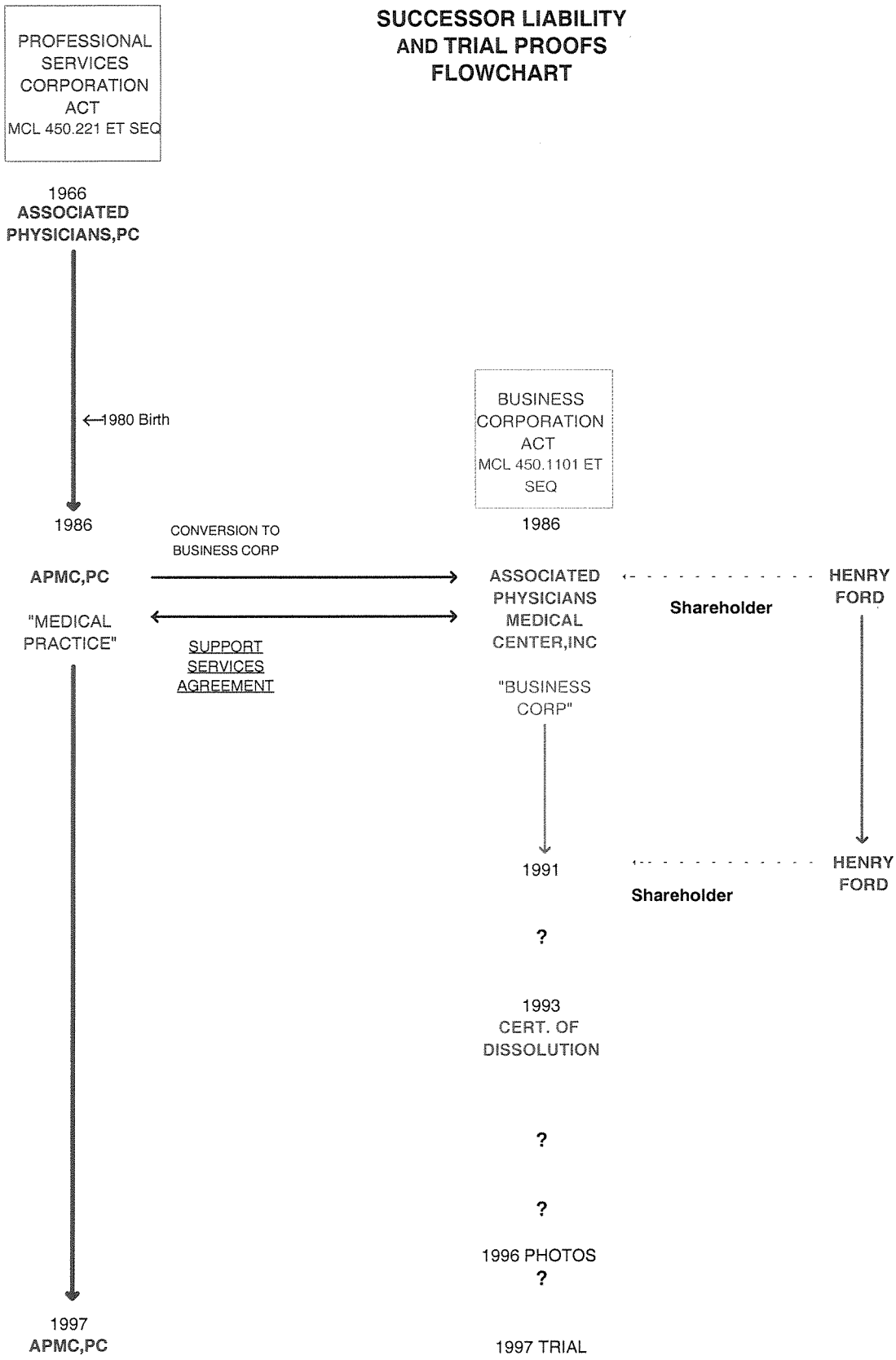
Pursuant to explicit legislative directive, MCL 450.230 and 450.233, Associated Physicians, as a "P.C.", could not merge with nor could its shares be purchased by Henry Ford, as the latter's shareholders were not physicians. In order to implement their plan in compliance with these statutory directives, the physician owners of the professional corporation, Associated Physicians, P.C., in 1986 converted that entity into a business corporation, Associated Physicians Medical Center, Inc., under the Business Corporation Act, MCL 450.1101 et seq. Henry Ford purchased all of the shares of that business corporation in accordance with the provisions of the Business Corporation Act, and thus became the "parent corporation" of Associated Physicians Medical Center, Inc. (Appx 355a, Share affidavit, §§5b, 7).

Contemporaneously, the physicians of Associated Physicians, P.C., formed another professional medical corporation, APMC, P.C., to continue the existing medical practice of Associated Physicians, P.C. at the Taylor clinic. John Casey, M.D., the president of Associated Physicians, P.C., became the president of APMC, P.C. (see Appx 378a, 1987 Annual Report of APMC, P.C.).

The medical professional corporation, APMC, P.C., then also entered into an arms-length contract with the business corporation, Associated Physicians Medical Center, Inc. This "Support Services Agreement" specifically outlined the relationship and obligations between the medical professional corporation, APMC, P.C., and the business corporation, Associated Physicians Medical Center, Inc. (Appx 360a-368a, Support Services Agreement).

APMC, P.C., was to continue the medical practice at the same Taylor location as Associated Physicians, P.C., employ the physicians, and be solely responsible for and have ultimate control over all medical care provided to patients. Associated Physicians Medical Center, Inc., was to provide such items as administration, medical record keeping and billing. For example, Associated Physicians Medical Center, Inc., became the record custodian of APMC, P.C.'s patient medical records (Appx 369a-363a, Support Services Agreement, pp 1-3). The following "Successor Liability and Trial Proofs Flowchart" (also reproduced in the Appendix, 454a) will aid the Court in its analysis of the transactions involved as well as the so-called evidence produced by plaintiff in support of her claim of "successor" liability.

SUCCESSOR LIABILITY AND TRIAL PROOFS FLOWCHART



Pursuant to the Support Service Agreement, neither the business corporation, Associated Physicians Medical Center, Inc., nor its shareholder/parent corporation, Henry Ford, had any control over the physicians' continuation of their medical practice. APMC, P.C., specifically contracted to continue the medical practice of Associated Physicians, P.C., and to "at all times exercise ultimate control of the medical care provided to patients" (Appx 362a, Agreement, p 3).

At the successor trial, plaintiff presented an exhibit showing that Henry Ford was the shareholder of the business corporation, Associated Physicians Medical Center, Inc., in 1991 (see Appx 347a, 1991 Mich Annual Report-Profit Corporation report of Associated Physicians Medical Center, Inc.). Plaintiff did not introduce any evidence pertaining to that relationship after 1991. The business corporation, Associated Physicians Medical Center, Inc., was dissolved as a corporation effective May 19, 1993, more than a year before the Craig suit was filed (Appx 349a, Certificate of Dissolution). Plaintiff produced no evidence regarding the dissolution, other than a one page certificate of dissolution filed with the State of Michigan (Id.).

Attorney Daniel Share, who was intimately involved in the 1986 transactions, testified by affidavit that based upon his familiarity with those transactions, and as an expert attorney in such matters, that Henry Ford was not the successor to Associated Physicians, P.C. (Appx 355a-359a, Affidavit of Daniel Share, §§ 13 and 14.) Plaintiff offered no contrary expert testimony, nor any testimony whatsoever, at the "successor" trial.

The first notice to Henry Ford of the Antonio Craig claim against Dr. Gennaoui and Associated Physicians, P.C. was when the lawsuit, filed in Wayne County Circuit

Court on March 30, 1994, was served on Henry Ford in 1995 (Appx 415a, affidavit of Mr. Mucha).[1]

Henry Ford was alleged in that complaint to be the "successor" of Dr. Gennaoui's actual employer, Associated Physicians, P.C. However, Associated Physicians, P.C., in fact appeared and was represented by counsel in the malpractice trial and a judgment on the malpractice verdict was entered against it (Appx 275a, Judgment of July 10, 1997). Associated Physicians, P.C., appealed and is now before this Court. Further, at the time of the successor trial in 1997, the professional corporation, APMC, P.C., which had continued the medical practice of Dr. Gennaoui's employer, Associated Physicians, P.C., was still in existence (Appx 372a-414a, APMC, P.C., Annual Reports).

Following denial of Henry Ford's motion for summary disposition on the successor issue, on August 12, 1997, a one-hour bench trial was conducted on the so-called successor liability issue as to Henry Ford (Appx 290a-335a, T 31). It was Henry Ford's position that there should be no successor liability by any other entity for Dr. Gennaoui's employer, Associated Physicians, P.C., as a matter of both law and policy. Alternatively, Henry Ford submitted that if there was to be successor liability, the appropriate successor would be the entity which continued the active medical practice of Dr. Gennaoui's employer, APMC, P.C., rather than the business corporation, Associated Physicians Medical Centers, Inc. Finally, Henry Ford submitted that plaintiff had not proven that successor liability could be extended from Associated Physicians,

---

[1] The Craig lawsuit initially alleged that a number of doctors from Henry Ford were responsible for unspecified acts of malpractice as to Antonio Craig (Antonio was treated at Henry Ford subsequent to his birth at Oakwood). However, all allegations of malpractice by Henry Ford physicians were unwarranted and dismissed by stipulated order (9/21/95 order of dismissal).

P.C., beyond Associated Physicians Medical Center, Inc., the business corporation, to Henry Ford, the parent (Appx 312a-314a, T 31: 23-25, Appx 323a-330a, closing argument at T 31: 34-41).

On September 12, 1997, Judge Carole Youngblood issued an opinion "stacking" theories of successor liability, one on top of the other, in order to enter judgment against Henry Ford. Judge Youngblood found that Henry Ford was the successor of the business corporation, Associated Physicians Medical Center, Inc., which she found in turn was the successor of Dr. Gennaoui's actual employer, Associated Physicians, P.C. (Appx 417a, opinion and order regarding liability of Henry Ford).

Judge Youngblood refused to consider the successor liability of the entity which continued Associated Physicians P.C.'s medical practice, APMC, P.C. (erroneously stated by her in her opinion to be "Associated Physicians Medical Center, P.C." [sic]), since "That entity has not been sued in this lawsuit and is not represented" (Appx 420a, Id., 4 n 1). Thus, because plaintiff's counsel never bothered to investigate and name as a defendant the only arguable successor to Associated Physicians, P.C., Judge Youngblood refused to even address the defense of Henry Ford that if successor liability was to be imposed in this case, plaintiff has not sued the proper successor.

Judge Youngblood entered an order on September 26, 1997, holding Henry Ford liable for the verdict of nearly $36,000,000 which had been returned against Dr. Gennaoui, Associated Physicians, P.C., and Oakwood Hospital (Appx 422a, 9/26/97 order). Henry Ford's motion for the Court to make new findings and conclusions, filed on September 18, 1997, was also denied by that same order. All defendants filed timely appeals to the Court of Appeals.

Court of Appeals Decision

The Court of Appeals issued a published opinion on February 1, 2002 (Appx 425a). The Court, through the concurring opinion of Judge Cooper, in which Judges Sawyer and Owens concurred, held that Henry Ford Health System was liable for the conduct of Dr. Gennaoui under successor liability doctrines. The Court rejected Henry Ford's positions, inter alia, that the evidence was insufficient to establish the successor liability elements of Turner v Bituminous Casualty Co, infra, or alternatively that successor liability should not be expanded to this professional services context, or certainly in a case such as this where the claim was not asserted, and therefore unknown, until years after the corporate transactions at issue.

The Court of Appeals, in addressing the merits of the issues raised by the co-defendants (which were identical to those raised by Henry Ford) with regard to the medical malpractice trial, held that the proofs were sufficient, and the errors below insufficient to disturb one of the largest medical malpractice awards in Michigan history.

Defendants all filed timely motions for rehearing which were denied by the Court by order of April 5, 2002.

SUMMARY OF ARGUMENT

The lower courts erred as a matter of law and policy in extending successor liability (1) through transactions involving Associated Physicians Medical Center, Inc. and Dr. Gennaoui's employer, co-defendant Associated Physicians, P.C., which occurred in 1986, six years after the alleged malpractice, but years before any claim for malpractice was asserted, and (2) then through subsequent dissolution of Associated Physicians Medical Center, Inc., in 1993, to impose liability for the 1980 malpractice on

Henry Ford (its shareholder) by a "de facto" merger. Successor liability should be limited to product liability cases, and should not be imposed upon a non-professional entity which does not continue the professional medical enterprise of a professional corporation, and which had no notice of the claim. Moreover, there was no evidence of either a "de facto merger" or to justify a piercing of the corporate veil so as to extend liability from Associated Physicians Medical Center, Inc. to the parent shareholder Henry Ford.

Alternatively, judgment in defendants' favor notwithstanding the malpractice verdict should be entered. The scientific causation evidence to which Dr. Gabriel testified was not demonstrated by plaintiff to be reliable, and thus was inadmissible under MRE 702. Finally, the testimony of plaintiff's experts as to both breach and causation was based on facts not in evidence.

STANDARDS OF REVIEW

The trial judge's legal rulings are reviewed de novo, Attorney General v Huron County Road Comm'n, 212 Mich App 510, 515; 538 NW2d 68 (1995), as is the question of the sufficiency of the evidence to establish a prima facie case of liability in the first instance, see Meager v Wayne State University, 222 Mich App 700, 707-708; 565 NW2d 401 (1997). Evidentiary rulings are reviewed for an abuse of discretion. Anderson v Harry's Army Surplus, Inc, 117 Mich App 601; 324 NW2d 96 (1982).

The factual findings of a trial judge sitting without a jury are reviewed for clear error. Colovos v Transportation Dep't, 205 Mich App 524, 527; 517 NW2d 803 (1994), aff'd 450 Mich 861; 539 NW2d 375 (1995). A finding is clearly erroneous when "'although there is evidence to support it, the reviewing court on the entire record is left

with the definite and firm conviction that a mistake has been made.'" Id. In a nonjury case such as this "'the "judicial sieve" with which [the Court] sift[s] the evidence...is "of finer mesh than the one correspondingly employed on review" of a jury's verdict.'" Id. Further, where as here a finding is derived from an erroneous application of law to the facts, the appellate court is not limited to review for clear error. Nor is an appellate court so limited where the trial judge's factual findings may have been influenced by an incorrect view of the law. Beason v Beason, 435 Mich 791, 804-805; 460 NW2d 207 (1990).

ARGUMENT

I THE LOWER COURTS' IMPOSITION OF SUCCESSOR LIABILITY ON HENRY FORD, AFTER A ONE-HOUR BENCH TRIAL, WAS CONTRARY TO LAW AND POLICY, AND UNSUPPORTED BY SUFFICIENT EVIDENCE, REQUIRING JUDGMENT AS A MATTER OF LAW FOR HENRY FORD.

A. Successor Liability As Developed In Product Liability Cases Should Not Be Imposed As A Matter Of Law And For Sound Public Policy Reasons Upon A Non-Professional Entity Which Does Not Continue The Professional Medical Enterprise Of A Professional Corporation, And Which Had No Notice Of The Claim.

In its published opinion, the Michigan Court of Appeals has significantly (and improperly) expanded the equitable remedy of successor liability beyond the traditional product liability context to professional (medical) services. In so doing, the Court of Appeals has misapplied this Court's decision in Turner v Bituminous Casualty Co, 397 Mich 406; 446 NW2d 95 (1976), and ignored Stevens v McLouth Steel, 433 Mich 365; 446 NW2d 95 (1989). Contrary to this case law and sound public policy, the Court of Appeals has imposed a massive $35 million "medical malpractice" verdict upon Henry Ford Health System which had nothing to do whatsoever with the alleged "medical malpractice". As evidenced by the surety bond filed by Henry Ford Health System,

there is no insurance coverage of this claim as Henry Ford Health System was not involved in any way with the alleged malpractice.

It is the general rule in Michigan as elsewhere that a corporation is not liable for the torts of its predecessor. Turner v Bituminous Casualty Co, 397 Mich 406, 417; 244 NW2d 873 (1976). Successor liability under a continuity of enterprise theory is an exception to this general rule of nonliability, an equitable principle utilized almost exclusively in Michigan in product liability cases.

Turner was a product liability case in which an injured plaintiff was faced with a defunct product manufacturer. He had no entity to sue, thus, the remedy of "successor" liability provided an equitable avenue for recovery. As this Court stated in Turner, 419:

> To the injured person, the problem of recovery is substantially the same no matter what corporate process led to the transfer of the corporation and/or its assets. . . He has no place to turn for relief except to the second corporation.

In Turner, this Court allowed the equitable remedy of successor liability where there was evidence of each of the following: (1) a basic continuity of enterprise, including retention of key personnel, assets, general business operations, and the name; (2) the predecessor corporation ceased business and dissolved soon after, (3) the successor corporation assumed liabilities necessary to carry on the business, and (4) the successor held itself out to the world as the continuation of the predecessor corporation. Turner, 430.

The successor liability doctrine has no applicability here for a number of policy and legal reasons (even aside from the insufficiency of the evidence to establish the Turner elements which is addressed in Argument I-B). First, successor liability cannot and should not be expanded outside the product liability context. As declared by the

Court in City Management Corp v US Chemical Co, Inc, 43 F3d 244 (CA 6, 1994), in holding that Turner's successor liability principles had no applicability outside of products liability:

> In sum, in a products liability case, the Michigan Supreme Court expanded the mere continuation exception to the general rule of nonliability to include cases where there is a continuity of enterprise. However, it seems clear from the reasoning, as well as the architecture of the court's opinion that the expanded Turner exception is limited to products liability cases. Id., passim. Although Michigan's lower courts have applied the continuing enterprise in a number of other cases, they have never applied the doctrine in a case where the underlying action was not grounded in products liability. Because we conclude that the Michigan Supreme Court intended that the continuing enterprise exception be limited to products liability cases, Turner is inapplicable to this case [involving environmental liabilities of an alleged successor corporation]. [City Management, 252-253, footnotes omitted.]

The overwhelming majority of cases reported in Michigan which has examined the "successor" issue concern product liability. In Turner, upon which Judge Youngblood and the Court of Appeals relied, this Court began its analysis (at page 416) with the statement, "This is a products liability case first and foremost..."

In a products liability case invoking successor liability, such as Turner, a standard scenario occurs: A manufacturer makes a product placing it in the stream of commerce, goes out of business and sometime after, an injury occurs involving the now defunct manufacturer's product. Since the manufacturer is no longer in existence, the injured plaintiff, as this Court stated in Turner, "Has no place to turn for relief except to the second corporation."

The courts then look to various factors to determine whether or not the equitable remedy of successor liability will impose liability on the "second" corporation. Such factors may be whether the second corporation takes on the same officers and employees as the original manufacturer, continues the product name, etc. What is

significant, however, in a products liability context is that the "second" corporation has complete knowledge and notice that products previously made by the now defunct manufacturer are still in the stream of commerce and that the potential exists for new injuries and lawsuits caused by those products for which that "second" corporation may be held liable.

This Court should not extend the rationale of Turner, as the Court of Appeals has done to a "non-product" context. As this Court stated in its conclusion in Turner, 429:

> In our analysis of the matter, we must conclude at this point that in a products liability case where the corporation fabricating the injury producing item changes corporate structure before injury and suit, as a matter of policy, neither the victim nor the successor corporation has a different interest vis-a-vis the suit whether the type of corporate metamorphosis-merger, de facto merger or sale of assets for cash, so long as the transferor corporation becomes defunct. [Emphasis added.]

Here the change of corporate structure which plaintiff argues gives rise to "successor" liability occurred in 1986, six years after the alleged birth injury of 1980. The injury did not result from a product produced by a now defunct corporation, previously placed in commerce, for which plaintiff has no remedy. The injury allegedly occurred due to the provision of personal medical services (medical malpractice), for which plaintiff does have a remedy, as will be subsequently discussed.

Successor liability is particularly inappropriate with respect to the vicarious liability for provision of personal, professional services by one individual to another, as occurred here between Kimberly Craig and Dr. Gennaoui. Although the appellate courts of Michigan have not addressed the specific issue of successor liability for personal professional services such as medical services, decisions of other states suggest that there can be no successor liability for negligent performance of services which are outside of the traditional "product liability" context. Greenlee v Sherman, 142

AD2d 472; 536 NYS2d 877 (1989), Elizabeth Gamble Home Assoc v Turner Construction, 38 Ohio Misc 2d 17; 526 NE2d 1368 (1986).

In Greenlee, the court held that the successor in interest of a furnace company could not be held liable in tort for the allegedly negligent installation of a furnace by the company's employee because the theory of successor liability was not applicable to an action for the negligent performance of services. The court noted that the rationale for successor liability "is merely an extension of the concept of products liability, which calls for the burden of consumer injuries to be borne by the manufacturer, who can transfer the costs to the general public as a component of the selling price." The court concluded:

> The case at bar does not involve the concept of products liability. The Greenlee's action is based upon the negligence of Sherman in the installation of the furnace; there is no claim that Sherman manufactured or sold a defective product. The Greenlees contracted directly with Sherman for certain services to be performed by him and their claim for damages is based upon Sherman's negligence in performing those services. In these circumstances, the public policy considerations underlying the concept of products liability...are not present. [Greenlee, 536 NYS2d at 879.]

In Elizabeth Gamble Home Ass'n, supra, the court applied a similar rationale to hold that the continuity exception to the general rule of no successor liability did not apply to the provision of architectural services:

> In the instant matter, the profession of architecture requires a significantly particularized exercise of skills on each assignment.... This fact furnishes additional justification not to adopt a products liability rationale in this matter. The design by an architect of a garage does not place into the stream of commerce a product that can cause injury.

Likewise, the provision of medical services here in no way places a product into commerce which could cause injury in the future. Here the injury occurred long before, indeed more than six years before, any of the transactions which plaintiff argues

imposes successor liability on Henry Ford.

The Court of Appeals previously held that for public policy reasons, it would not apply product liability law to doctors and hospitals who implant defective products during the surgical treatment of patients. In Ayyash v Henry Ford Health System, 210 Mich App 142; 533 NW2d 353 (1995), it was determined that doctors and hospitals performing surgical procedures using implanted products are delivering services to patients and not products and, therefore, are not liable under product liability law for defects in the product. Similarly, the "traditional" analysis of successor liability involving product manufacturers has no application in this case where the alleged active tort feasors are available and their alleged liability stems from providing professional medical services and not from a "product" placed in the stream of commerce by a defunct entity.

Successor liability must also be held inapplicable here because of the unique nature of the professional corporation which employed Dr. Gennaoui, for which Henry Ford ultimately was held to be liable as the successor. In 1986, six years after the birth of Antonio Craig, Associated Physicians, P.C., a medical professional corporation, entered into a transaction with Henry Ford. As previously discussed in the statement of facts, Associated Physicians, P.C., converted from a professional corporation to a business corporation called Associated Physicians Medical Center, Inc. Henry Ford became the shareholder and parent corporation of this business corporation.

The doctors who practiced medicine at Associated Physicians, P.C., formed a new professional corporation called APMC, P.C., to continue their medical practice. Contemporaneously, a 1986 Support Service Agreement between APMC, P.C., and

Associated Physicians Medical Center, Inc., was made. Pursuant to this contract, the doctors of Associated Physicians, P.C., continued their medical practice as APMC, P.C. APMC, P.C., in turn contracted with Associated Physicians Medical Center, Inc., to supply administration, bookkeeping and billing services for the medical professional corporation, APMC, P.C. It is undisputed that this is the essence of the 1986 transactions, as outlined in the Affidavit of attorney Daniel Share (Appx 355a).

Why did Henry Ford not simply buy the stock of or merge with Associated Physicians, P.C. in 1986? The answer is that Michigan law recognizes that a professional corporation, such as one providing professional (medical) services, is unique and its stock can only be purchased by similar professionals. Thus, pursuant to the Michigan Professional Service Corporation Act, MCL 450.230 and 450.233, Associated Physicians, P.C., could not be purchased, merged or consolidated with Henry Ford. MCL 450.230 and 450.233 provide, in relevant part:

> Shares in a corporation organized under this act [Professional Services Corporation Act] shall not be sold or transferred except to an individual who is eligible to be a shareholder of the corporation.... [MCL 450.230.]
>
> . . . A professional corporation organized under this act shall not consolidate or merge with another corporation whose shareholders are not licensed persons permitted to be shareholders under this act. [MCL 450.233.]

Henry Ford did not continue the medical enterprise of Associated Physicians, P.C. because it legally could not do so. In spite of the fact that Henry Ford could not legally purchase and own Associated Physicians, P.C., the Court of Appeals has imposed "successor" liability on Henry Ford as if it had merged with the professional corporation. How then can the equitable remedy of successor liability be imposed upon Henry Ford when it could not legally merge with, consolidate or buy the medical practice

of Associated Physicians, P.C.? Henry Ford submits that the obvious answer is that it cannot be indirectly held liable through a "successor" theory, for that which it could not legally do.

Associated Physicians, P.C., in 1986, converted and changed purposes from a professional medical corporation, under the Michigan Professional Services Corporation Act (MCL 450.221, et seq) to a business corporation, Associated Physicians Medical Center, Inc., under the Business Corporation Act, MCL 450.1101, et seq. This is legally significant since a new corporation, organized under a different Michigan statute and for a new purpose, was created. The Court of Appeals mistakenly relied on the irrelevant fact that the new, business corporation used the same State of Michigan identification number after 1986. This is simply a record-keeping, tracking number of the State of Michigan Department of Consumer and Industry Services which has no significance, given the fact that a new corporation, with a new purpose organized under a different state statute was created.

An analogous change was addressed by the Supreme Court of Washington in Clark Bros and Klein v Hinkle, 157 Wash 484; 289 P 59 (1930). The Court recognized that where a corporation organized under one state statute applicable to banking and trust businesses, and amended its articles of incorporation deleting the word "Trust" from its corporate name, a new corporation was created with a new purpose. That corporation could not subsequently engage in the trust business simply by amending its articles of incorporation to again include the word "Trust" in its corporate name.

Moreover, the equitable remedy of successor liability is also inapplicable in this case because plaintiff has a legal remedy. Plaintiff has a suit, a remedy and a judgment

against the individual co-defendant, Dr. Gennaoui, for whose wrongdoing Henry Ford is sought to be held vicariously liable. Plaintiff also has a suit, a remedy and a judgment against co-defendant, Associated Physicians, P.C., which is alleged to have been succeeded by Henry Ford. Additionally, plaintiff has a suit, a remedy and a judgment against Oakwood Hospital, the alleged joint tort feasor and co-defendant with Dr. Gennaoui. Because of this, there is no need to take a "successor" theory beyond Associated Physicians, P.C.

In Foster v Cone/Blanchard Machine Co, 460 Mich 696; 597 NW2d 506 (1999), this Court determined that Turner's continuity of enterprise/successor liability theory applied by the Court of Appeals in this case is inapplicable where plaintiff has successfully pursued a remedy against a predecessor. The Foster decision supports Henry Ford's position. The (alleged) predecessor, co-defendant Associated Physicians, P.C., was represented at trial and plaintiff took a judgment against it. Associated Physicians, P.C., was a party to this appeal and based upon Foster alone, the judgment should have been set aside as to Henry Ford Health System. This argument, raised below by defendant/appellant, was ignored by the Court of Appeals.

Other jurisdictions which have addressed this issue specifically have held that lack of a remedy against the original corporation is an essential element of successor liability, and that there can be no recovery against an alleged successor where the injured party has a remedy against the predecessor, in this case, Associated Physicians, P.C. 19 CJS § 657, LaFountain v Webb Industries Corp, 951 F2d 544 (CA 3, 1991), South Bend Lathe, Inc v Armisted Indust, 925 F2d 1043, 1047 (CA 7, 1991).

> "[A]s a logical matter, the loss of a remedy against the original manufacturer must be a prerequisite to the invocation of the product line

> exception [to no successor liability].... That is because the rationale of the product line exception is that "the virtual destruction of the plaintiff's remedies against the original manufacturer [was] caused by the successor's acquisition." [LaFountain, 547.]

Moreover, plaintiff could have also sued APMC, P.C., the entity which contractually continued the medical practice of Associated Physicians, P.C., but chose not to do that. The fact that plaintiff chose not to sue APMC, P.C., which actually (and contractually) continued the medical practice of Associated Physicians, P.C., cannot be ignored and defeats the basis for the imposition of liability upon Henry Ford.

Finally, successor liability is also inappropriate here as to Henry Ford which, when purchasing the shares of Associated Physicians Medical Center, Inc., in 1986, had no notice of the Craig claim. That claim was not asserted until nine years later, in 1994, long after the dissolution of the business corporation.

In a "non-product" context of employment discrimination, this Court in Stevens v McLouth Steel, 433 Mich 365; 446 NW2d 95 (1989), would not impose the equitable remedy of successor liability where the successor corporation had no notice of the claim prior to the so-called acquisition giving rise to plaintiff's allegation of "successor liability". In a non-product context, equity requires that the putative successor be given notice and the opportunity to fully assess claims before engaging in any transactions with the predecessor, which may give rise to subsequent liability. The Stevens notice requirement has its roots in fundamental due process and fairness: ". . . A person has notice of a fact only when it is actually communicated to him in such a way that his mind can and does take cognizance of it". Stevens, p 378. The notice of a claim to be sufficient to allow successor liability must be "clear, definite, explicit and unambiguous." Stevens at p 378.

The undisputed proofs established that Henry Ford in fact had no notice of any claim against Associated Physicians, P.C., involving the 1980 birth of Antonio Craig until served with this lawsuit 15 years later (Appx 415a, Affidavit of John Mucha).

In order to satisfy the Stevens requirement, plaintiff's counsel argued at the time of trial that "notice" of claims of Antonio Craig existed in the medical records of Antonio Craig, possessed by Henry Ford, by virtue of letters from two law firms requesting copies of Antonio Craig's records from Associated Physicians, P.C. Neither letter, however, referenced a claim against anyone, let alone a claim for malpractice based on the conduct of Dr. Gennaoui. For example, the 1983 letter indicated only that "My law office represents the above-named individual in a legal matter which requires me to send out the enclosed medical authorization, and request copies of ... any medical records ... and the total cost ... of treatment...." (Appx 339a). The 1985 letter, similarly requesting copies of records, did not provide any reason for the request at all (Appx 340a).

Further, plaintiff presented no evidence that either Associated Physicians Medical Center, Inc., or Henry Ford was aware of or in possession of these letters in the medical records before the 1986 transaction which the plaintiff asserts gives rise to the claim of "successor liability". These records came into Henry Ford's possession thereafter because Antonio Craig had been examined independently well after his birth, at Henry Ford's main campus. As part of the examination, and pursuant to specific releases, all of Antonio's prior records from Associated Physicians, P.C., were obtained for review by doctors at Henry Ford Hospital (Appx 323a-326a, T 31: 34-37). Thus, it is of no significance that Henry Ford during this medical malpractice litigation was in

possession in 1995, of records of Associated Physicians, P.C., concerning Antonio Craig.

The Court of Appeals in its opinion recognized this Court's "notice" requirement as stated in Stevens, but held that the two non-descript letters from attorneys requesting records provided the appropriate Stevens notice. Clearly, the Court of Appeals has ignored Stevens, that such notice be "clear, definite, explicit and unambiguous".

Contrary to the opinion of the Court of Appeals, no reasonable person could find that the two non-specific letter requests for medical records directed to Associated Physicians, P.C. from two different law firms in 1983 and 1985 provided notice to Associated Physicians Medical Center, Inc. or Henry Ford of a claim for malpractice for 1980 medical care. Neither letter to Associated Physicians, P.C., intimates that there was an actual or potential malpractice claim against Associated Physicians, P.C. nor supports any such inference. (Indeed, neither of these authoring law firms ultimately found any basis for a malpractice claim.) Medical record custodians daily receive record requests for a variety of reasons, including every sort of tort claim, billing disputes with insureds or health care providers, claims for social security disability benefits, etc. A mere request for records does not satisfy the notice requirement of Stevens as a matter of law, and the Court of Appeals clearly erred in finding that the two letters met the requirement.

There is very strong public policy against imposing the "product liability" concept of successor liability upon Henry Ford. The Court of Appeals in Ayyash, supra, has already refused to extend product liability law to doctors and hospitals for their use of products during treatment and surgery. Antonio Craig's mother never looked to Henry

Ford or any of its facilities for medical care or treatment in 1980. In 1980, there was no connection whatsoever between Associated Physicians and any Henry Ford entity upon which plaintiff could have relied. Due to the very long "tail" involving medical malpractice claims, an expansion of liability through the equitable remedy of successor liability would create unlimited exposure for any healthcare system which expands its activities. Further, since Henry Ford did not commit any acts of malpractice, there is no insurance coverage available to Henry Ford for the judgment imposed by the Court of Appeals for the malpractice of others. The imposition of a judgment upon Henry Ford for the alleged medical malpractice of others is a risk that is totally unforeseeable. It is for this very reason that Stevens, supra, requires clear and unambiguous notice. Henry Ford submits that it is inequitable (and incomprehensible) to impose the equitable remedy of successor liability upon Henry Ford for an alleged malpractice claim involving a birth which occurred in 1980, which Henry Ford had nothing to do with, and of which Henry Ford did not have notice until 15 years later. This is particularly true since plaintiff has an avenue of recovery from Oakwood Hospital, Dr. Gennaoui, and APMC, P.C., the professional medical corporation which continued the medical practice of Associated Physicians, P.C.

Finally, by expanding the equitable remedy of successor liability to the provision of professional services, the Court of Appeals has significantly increased the potential liability of numerous professionals who purchase or otherwise continue the professional business of others, including lawyers, accountants, health professionals, architects, engineers, etc. In its determination to fashion a remedy against Henry Ford Health System, the Court of Appeals improperly failed to consider these public policy

implications.

B. If Successor Liability Is To Be Imposed In A Professional Medical Corporation Context, Plaintiff Nonetheless Failed To Establish A Prima Facie Case Of Successor Liability As To The Business Corporation, Associated Physicians Medical Center, Inc.; The Actual Successor, If Any, Would Have Been The Professional Corporation Which Continued The Medical Practice, APMC, P.C.

In 1986, six years after the birth of Antonio Craig, 23 of the 24 physician shareholders of Associated Physicians, P.C., formed a Michigan professional medical corporation called APMC, P.C., and continued the same medical practice of Associated Physicians, P.C. These doctors provided medical care to the same patients at the same locations where Associated Physicians, P.C., practiced medicine. (Appx 355a, affidavit of D. Share.)

If Dr. Gennaoui had not left the employ of Associated Physicians, P.C., in the early 1980's to enter his own private practice, he would have been a physician employed by APMC, P.C. Evidence from the one hour "successor" trial proved that APMC, P.C., was still a viable Michigan professional corporation. (Id.) Given these facts, if there is any successor to Associated Physicians, P.C., it is APMC, P.C.

Amazingly, Judge Youngblood not only did not address this issue but specifically ruled that because plaintiff's counsel had not sued APMC, P.C. (which she mistakenly identifies in her opinion at footnote 1 on page 4 as "Associated Physician Medical Center, P.C." [sic]): "This Court will not consider the successor liability" of that entity (Appx 420a, opinion and order, p 4). While Judge Youngblood, obviously, could not enter a judgment against a nonparty, she nonetheless was obligated to consider the legal implications of APMC, P.C.'s role and its continuation of the medical practice of Associated Physicians, P.C. Similarly, the Court of Appeals ignored APMC, P.C.

Thus, because plaintiff's counsel did not bother to determine and sue the only arguable successor, Judge Youngblood and the Court of Appeals ignored the defense of Henry Ford that plaintiff sued the wrong successor. A $35 million verdict cannot be imposed upon Henry Ford as the successor to Associated Physicians Medical Center, Inc., which in turn was found to be the successor of Associated Physicians, P.C., when the undisputed evidence shows that plaintiff sued the wrong defendant.

At page 17 of its opinion, the Court of Appeals outlines the four prong test from Turner as to the continuation of corporate responsibility in a products liability setting. Although paying lip service to the test, the Court of Appeals has ignored the fundamental theme of Turner for the imposition of successor liability, that is, whether the successor maintains the "basic continuity of the enterprise" of the predecessor.

As outlined in the Support Service Agreement, neither Associated Physicians Medical Center, Inc., nor its shareholder/ parent, Henry Ford, had any control of the medical practice and the physicians of APMC, P.C. (Appx 360a.) The business enterprise of Associated Physicians, P.C., was to provide medical care and treatment, and the continuation of this business enterprise was maintained by the same physicians under the name APMC, P.C. Dr. Casey, the president of Associated Physicians, P.C., became the president of APMC, P.C. (Appx 355a, Affidavit of D. Share). To ignore the transfer and continuity of the medical practice from Associated Physicians, P.C., to APMC, P.C., for the reason that plaintiff never bothered to sue APMC, P.C., suggests that the motivation of the trial court and the Court of Appeals was to reach the end result of finding Henry Ford liable, regardless of the facts or the law.

Application of the Turner test leads to the conclusion that if there is a successor,

APMC, P.C., is the successor. Under the first test in Turner, this Court addressed the question "whether there is a basic continuity of the enterprise of the seller corporation, including retention of key personnel, assets, general business operations and the name". 23 of the 24 doctors of Associated Physicians, P.C., who formed APMC, P.C., not only specifically continued "the enterprise" of Associated Physicians, P.C., that is providing medical services, but specifically contracted through the Support Service Agreement to do so. They worked out of the same office, and Dr. John Casey, the president of Associated Physicians, P.C., became the president of APMC, P.C. (Appx 355a, affidavit of D. Share).

As to the second test, APMC, P.C., continued the medical practice of Associated Physicians, P.C. It contracted with Associated Physicians Medical Center, Inc., to provide ancillary administrative support. The 1996 Michigan Annual Report for APMC, P.C., shows its registered office at 24555 Haig Street, Taylor, the same business address previously used by Associated Physicians, P.C. This Annual Report also identifies the nature and type of business as "Medicine Services" (Appx 412a, 1996 Annual Report).

As to the third test, there were no provisions in the Support Service Agreement or elsewhere in the record for assumption of debt by Associated Physicians Medical Center, Inc. As to fourth test, APMC, P.C., held itself out as the medical provider for patients in the place of Associated Physicians, P.C. Under these facts and even applying the "product liability test" found in Turner, the conclusion is that APMC, P.C., was the successor of the Associated Physicians, P.C., having employed the same doctors who treated the same patients.

The Court of Appeals erroneously concluded that "the basic requirements for imposing liability on a successor corporation stated in Turner have been met." Simply stated, the analysis of the Court of Appeals fails since it assumes that Associated Physicians Medical Center, Inc., "carried on" the " enterprise" of Associated Physicians, P.C. As set forth above, Associated Physicians Medical Center, Inc., by way of an arms length contract, simply provided administrative support to APMC, P.C., which continued the medical practice of Associated Physicians, P.C. The business "enterprise" of Associated Physicians, P.C. (i.e. the medical practice) was "carried on" at the same location by APMC, P.C., not Associated Physicians Medical Center, Inc. Judgment as a matter of law was improperly denied to Henry Ford Health System.

C. Even If Associated Physicians Medical Center, Inc. Was The Successor To Associated Physicians, P.C., There Was No Evidence At The One Hour "Successor Liability" Trial Of A "De Facto Merger" And No Evidence Upon Which To Pierce The Corporate Veil, And Extend Liability To The Parent/Shareholder Henry Ford.

Even if this Court were inclined to extend the equitable remedy of successor liability to the provision of professional services, and even if this Court determined that Associated Physicians Medical Center, Inc., (rather than APMC, P.C.) was the successor of Dr. Gennaoui's employer, plaintiff failed to connect that successor liability through and beyond Associated Physicians Medical Center, Inc., to its shareholder parent, Henry Ford. It was plaintiff who bore the burden of proof to establish Henry Ford Health System's liability under a theory of de facto merger, Lemire v Garrad Drugs, 95 Mich App 520; 291 NW2d 103 (1980), or actual merger, Denolf v Frank L Jursik Co, 54 Mich App 584; 221 NW2d 445 (1984), affirmed in part, reversed in part on other grounds, 396 Mich 661; 238 NW2d 1 (1966). Illustrative of this principle is the case of Chase v Michigan Telephone Co, 121 Mich 631, 635; 80 NW2d 717 (1899) cited in

Denolf, supra. In Chase, this Court refused to apply successor liability where plaintiff showed no more than that a company had sold its assets to the defendants which then continued the business with the same employees under a new name.

> The fact that defendant owned a majority of stock in the construction company does not tend to show consolidation or an assumption of the obligation of the vendor. There is no testimony tending to show the terms of that sale. . . What the consideration was for the sale, or how it was paid, does not appear. It was left to conjecture.

Quoting from Chase, the Court of Appeals stated in Denolf:

> The record is barren of evidence to show a consolidation. It only shows a sale. The *onus probandi* was on plaintiff to show that the purchase was made subject to the obligations of the construction company. Upon this point, the record is also barren of evidence. The court should have directed a verdict for defendant [Denolf, pp 589-590].

For the Court of Appeals to find that plaintiff met her burden of proving a "de facto" merger based upon the barren record made by plaintiff, which consisted of no testimony at the one hour "successor liability trial", but only plaintiff's counsel's argument referencing a few disjointed exhibits is not only a manifest injustice, but absurd.

Although listing the "de facto" merger requirements from Turner at page 19 of its opinion, the Court of Appeals ignored those requirements and accepted the abysmal record made by plaintiff at the one hour "successor liability trial" to impose the verdict of more than $35 million upon Henry Ford Health System. The Court of Appeals found that there was a Turner "de facto" merger based upon the facts that:

1. In 1991, Henry Ford was the shareholder of Associated Physicians Medical Center, Inc.;

2. In 1993, Associated Physicians Medical Center, Inc., dissolved; and

3. In 1996, Henry Ford operated Henry Ford Medical Center-Taylor in

> the building at 24555 Haig, Taylor, Michigan, which had once been an address of Associated Physicians, P.C. but was also (for the years 1987 through 1996) the business address of APMC, P.C.

The Court of Appeals stated at page 19 of its opinion: "There was no sale, per se, because Henry Ford Health System was the parent corporation of the dissolving corporation and caused the dissolution". There is no evidence in this record whatsoever to support that conclusion. There was no evidence in the record that in 1993, Henry Ford was even the shareholder of Associated Physicians Medical Center, Inc. There is no reference to Henry Ford in the 1993 dissolution document introduced at trial, thus, there was no evidence that Henry Ford "caused the dissolution of Associated Physicians Medical Center, P.C." In Michigan, a dissolved corporation is a dead person. US Truck v Penn Surety, 259 Mich 422, 426; 243 NW2d 311 (1932), In Re: Esquire, 145 Mich App 106, 110; 377 NW2d 356 (1985). Plaintiff produced no evidence to the contrary, or of any "merger".

The Court of Appeals further makes the unwarranted statement, not supported by the record, at page 19; "Moreover, Henry Ford Health System continued to operate a medical clinic at the site of the former Associated Physicians, P.C., which was the same site operated by Associated Physicians Medical Center, Inc." To the contrary, the evidence established that Associated Physicians Medical Center, Inc., never provided any medical services and, therefore, never operated any medical clinic. It provided administrative services to APMC., P.C., which continued the medical practice of Associated Physicians, P.C. at 24555 Haig.

Further, this Court of Appeals statement is disingenuous since it implies that the proofs established that Henry Ford continuously operated a medical clinic at the Haig address upon the 1993 dissolution of Associated Physicians Medical Center, Inc.,

sufficient to support a "de facto" merger. The proofs (pictures taken by plaintiff in October, 1996 of 24555 Haig) only established that in 1996, Henry Ford operated a facility at the Haig address (which was also the business address of APMC, P.C.) three years after the dissolution of Associated Physicians Medical Center, Inc. Plaintiff's 1996 pictures of the building at 24555 Haig mean nothing, given the total lack of a record made by plaintiff in support of a "de facto merger". Without rank speculation and conjecture, there was absolutely no basis to find a de facto merger. Factfinders, be they jury or court, may not indulge in conjecture. Genesee MD & T Co v Payne, 6 Mich App 204; 148 NW2d 503 (1967) affirmed 381 Mich 234; 161 NW2d 17 (1968). This Court in Michigan Aero Club v Shelly, 283 Mich 401; 278 NW2d 121 (1938) summarized the longstanding law applicable to a court sitting without a jury in determining whether or not plaintiff has proven his case:

> . . . If plaintiff, due to lack of proof, does not make out his case, the court should so hold . . . A mere claim cannot stand in the place of evidence and operate as proof . . . Things not made to appear must be taken as not existing . . . Plaintiff's case must be established by the evidence. The court may not guess in default of evidence . . . Judgment may not be based upon speculation or conjecture . . . To prove a possibility only, or to leave the issue to surmise or conjecture is never sufficient to sustain a judgment . . . A verdict must stand upon evidence and not upon conjecture however plausible . . . A verdict cannot be permitted to stand which rests upon conjecture, surmise or speculation . . . Plaintiff must make out his case by proof or fail to recover. [Citations omitted.] [Id.]

Michigan Aero Club v Shelly continues to be applied by Michigan courts. See e.g., Star Steel v USF & G, 186 Mich App 475, 481; 465 NW2d 17 (1990).

Moreover, even if the record established that Henry Ford had been a shareholder in Associated Physicians Medical Center, Inc. when it dissolved in 1993, there was no evidence of the Turner "de facto merger" requirements. There was no evidence whatsoever of a continuation (by Henry Ford) of the enterprise of Associated Physicians

Medical Center, Inc. after its dissolution and no evidence that Henry Ford took over or contracted to provide billing or administrative services to APMC, P.C. which had been provided by Associated Physicians Medical Center, Inc.

Even more critically, there was no evidence whatsoever to support the Court of Appeals quite extraordinary and amazing declaration that Henry Ford "assumed the liabilities and obligations of Associated Physicians Medical Center, Inc., after its dissolution." This is indeed the third Turner criteria--that "the purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the seller corporation." There was admitted no evidence of any such assumption of liabilities and obligations by HFHS.

There also was no evidence of the fourth Turner element--that HFHS "held itself out to the world as the effective continuation of the seller corporation." To the contrary, plaintiff's only evidence (the 1996 photo) was that Henry Ford held itself out as itself--Henry Ford Medical Center (Appx 353a).

There were no facts and no basis for the Court of Appeals to find a "de facto merger". Similarly, there was no basis to pierce the corporate veil and extend liability from Associated Physicians Medical Center, Inc., to its parent, Henry Ford. In Michigan, "It is clear that a shareholder is a separate legal entity from the corporation." Bitar v Wakin, 456 Mich 428, 431; 572 NW2d 191 (1998) (Lead opinion by Brickley). Where one corporation is the sole shareholder of another (a parent subsidiary relationship) it is "a well-recognized principle that separate corporate entities will be respected." Seasword v Hilti, Inc (After Remand), 449 Mich 542, 547; 537 NW2d 221 (1995). Michigan law "presumes" that, absent some abuse of corporate form, parent and

subsidiary corporations are separate and distinct entities. Id. As was most recently summarized by this Court in Seasword with respect to the limited circumstances under which the "corporate veil" may be pierced and a parent corporation may be held vicariously liable for a subsidiary:

> This presumption [that parent and subsidiary corporation are separate and distinct], often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly over-riding public policy" Wells, supra at 650; Helzer v F Joseph Lamb Co, 171 Mich App 6, 9; 429 NW2d 835 (1988). More specifically, Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded. Maki v Copper Range Co, 121 Mich App 518, 524; 328 NW2d 430 (1982). [Seasword, 548.]

This Court in Seasword makes "it clear that in order to state a claim for a tort liability based on an alleged parent-subsidiary relationship, a plaintiff would have to allege [and in this context of trial, prove] . . . facts that justify piercing the corporate veil." Seasword, 548. In order to establish that a parent corporation should be held vicariously liable for a subsidiary because the subsidiary is merely an "instrumentality", three things must be established: (1) control by the parent to such a degree that the subsidiary has become its mere instrumentality; (2) fraud or wrong by the parent through its subsidiaries; and (3) unjust loss or injury to the claimant. Maki, 525.

The so-called evidentiary record made by plaintiff in this case could not even justify the piercing of the corporate veil between Associated Physicians Medical Center, Inc., and its parent, Henry Ford, much less support a finding by the Court of Appeals that there was a "de facto" merger. The barren evidentiary record completely fails to show "control by the parent to such degree that the subsidiary has become its mere instrumentality". Maki, supra. The evidentiary record in this case which established that

in 1991, Henry Ford was the shareholder of Associated Physicians Medical Center, Inc., cannot support the "conclusion" of the Court of Appeals that there was a "de facto" merger in 1993 or that in any way the corporate veil should be pierced. It is well established that mere ownership of the stock of a subsidiary corporation by a parent or even the carrying of common officers and directors is not sufficient to charge the parent corporation with the acts of the subsidiary. Maki v Copper Range Co, 121 Mich App 518; 328 NW2d 430 (1982), Glendhill v Fisher & Co, 272 Mich 353; 262 NW2d 371 (1935).

The gaping holes in plaintiff's proofs demonstrated in the "Successor Liability And Trial Proofs Flow Chart," supra, cannot be filled in by the argument of plaintiff's counsel or speculation by the trial court and the Court of Appeals. Based upon these evidentiary gaps alone, it was totally improper, speculative, arbitrary and manifestly unjust for the Court of Appeals to conclude that there was a "de facto merger" imposing the jury verdict of more than $35 million upon Henry Ford Health System.

II THE OPINION TESTIMONY OF PLAINTIFF'S EXPERT WITNESSES WAS NOT DEMONSTRATED BY PLAINTIFF TO BE RELIABLE UNDER MRE 702, AND/OR WAS BASED ON FACTS NOT IN EVIDENCE, WARRANTING JUDGMENT FOR DEFENDANTS NOTWITHSTANDING THE MALPRACTICE VERDICT.

To establish a prima facie case of medical malpractice, plaintiff must show through admissible, qualified expert testimony that but for a specific breach of the standard of practice, the child's brain damage medically and scientifically probably would not have occurred. Weymers v Khera, 454 Mich 639; 563 NW2d 647 (1997), Farrell v Haze, 157 Mich 374, 379-380; 122 NW2d 197 (1909), Locke v Pachtman, 446 Mich 216, 222; 521 NW2d 786 (1994), MCL 600.2912a. Equal possibilities with other

causes, or speculation without factual foundation, is not sufficient, and requires a directed verdict or judgment notwithstanding the verdict. Weymers, supra, Skinner v Square D Co, 445 Mich 153, 165-167; 563 NW2d 647 (1994).

Similarly, the testimony of an expert which is not admissible because it is not sufficiently reliable under MRE 702, cannot serve to create a prima facie case and requires judgment as a matter of law for the defendant. See Pedler v Emmerson, 313 Mich 78; 49 NW2d 70 (1951) (judgment for defendant ordered on appeal where testimony of unqualified expert erroneously admitted), Weisgram v Marley Co, 528 US 440 (2000) (an appellate court may direct judgment as a matter of law when evidence erroneously admitted under FRE 702 is insufficient to constitute a submissible case).

Application of these basic principles compels the conclusion that judgment as a matter of law should be entered in defendants' favor.

A. The Breach And Causation Theories Of Plaintiff's Experts.

Plaintiff's single standard of practice expert, obstetrician Paul Gatewood, M.D., claimed that Dr. Gennaoui and the Oakwood Hospital staff breached the standard of practice in failing to recognize from the monitors during labor that an overdose of Pitocin was creating a risk of injury to the child of "hypoxic ischemia". According to Dr. Gatewood, the risk of "hypoxic ischemia" (insufficient oxygenation of tissue) is presented when Pitocin "overstimulates" the uterus so that there is not sufficient relaxation to allow the flow of blood between contractions (Appx 52a, T 10: 71).[2]

---

[2] When a contraction occurs, the flow of oxygenated blood from the mother's placenta to the fetus (the source of the fetus' oxygen while in utero) through the cord is temporarily, and quite normally, slowed or shut down. If the contractions are too frequent or last too long, however, and the supply of oxygenated blood reduced too often or too long, there can result insufficient oxygenation of fetal tissue - "hypoxia" or "hypoxic ischemia", and organ damage (Appx 52a-53a, 58a-60a, Gatewood T 10: 71-72, 129-131). This

However, both Dr. Gatewood and plaintiff's only causation expert, Dr. Gabriel, agreed that the child did not sustain any hypoxic ischemia injury. All agreed that hypoxic injury necessarily would have been accompanied by evidence at birth of profound injury to the child (abnormal "APGARS", which record signs of well being, such as color and respiration, severe organ damage, and floppiness, etc). None of this was present here, as the child appeared healthy at birth (Appx 193-202a, Gabriel T 13: 122-131; Appx 73a-75a, Gatewood T 11: 153-155).

Dr. Gabriel nonetheless asserted a purely hypothetical theory of brain injury due to physical trauma occurring during labor, with no visible, external signs of injury. Specifically, Dr. Gabriel asserted that an overdose of Pitocin caused excessively strong uterine contractions, which caused high internal uterine pressures, which in turn caused the child's skull to pound or grind against a "bony protrusion" within the mother, which caused physical trauma to and compression of the brain within the skull, which caused brain injury not apparent until signs of mental retardation were first noted three months later.

Dr. Gabriel claimed this invisible, asymptomatic injury was caused by a combination of two effects of physical compression of the child's skull, one "vascular" and one "traumatic" (Appx 110a-111a, T 13: 38-39):

> I think the injury occurred in two ways. First there was compression of the head through grinding experience with the head in the pelvic rim, accentuated by high uterine pressures from Pitocin producing decelerations which were quite marked after a certain point in time. And this resulted in compression, producing a compression injury over the surface of the brain. And this in turn also resulted in elevation in venous pressures of the brain, which then impedes arterial blood flow. [Appx 90a-

---

concededly is a scientifically recognized risk of excessive contractions and cause of brain damage during labor.

91a, T 13: 18-19.]

This first mechanism, hypothesized by Dr. Gabriel, was excessive uterine pressure causing the baby's skull to be "pounded" or "grinded" in a piston-like fashion against some hard, bony structure in the uterus he called the "pelvic outlet" (but could not otherwise identify or locate on pictures of the uterus) (Appx 90a-93a, 175a-176a, 186a, Gabriel T 13: 18-21, 104-105, 115). The second, or "vascular" mechanism asserted by Dr. Gabriel, was an aspect of the trauma theory--that there was an increase in venous pressure within the fetal brain due to physical compression over the entire surface of the fetal skull. He theorized this resulted in reduced venous blood flow within the fetal brain (rather than a globally reduced arterial blood flow to the brain from the placenta, as is involved in hypoxic ischemia) (Appx 90a-93a, Gabriel T 13: 18-21).

B. The Scientific Causation Evidence To Which Dr. Gabriel Testified Was Not Demonstrated By Plaintiff To Be Reliable, And Thus Was Inadmissible Under MRE 702 And Insufficient To Support A Prima Facie Case.

Dr. Gabriel's claim that, despite the absence of any physical evidence of traumatic injury, and the multitude of other possible causes, the child's condition nonetheless probably was caused by invisible trauma due to high uterine pressures was not shown to have a reliable scientific basis.

1. MRE 702 requires a party offering expert testimony to demonstrate, and the trial court as "gatekeeper" to determine, reliability before its admission.

MRE 702 at the time of trial in this matter provided:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

This rule incorporated the so-called Davis/Frye test where expert testimony is not admissible unless it is first shown by its proponent to be both "reliable" and "recognized" ("generally accepted," "Frye" v US, 293 F 1013 (1923).) People v Young, 418 Mich 1, 5, 24; 340 NW2d 805 (1983), see People v Hayward, 209 Mich App 217, 221 n 1; 530 NW2d 497 (1995).

Adopting the approach of the federal courts, in Daubert v Merrell Dow Pharmaceuticals, Inc, 509 US 579 (1993), and FRE 702, this Court has amended MRE 702 to eliminate the Frye "generally accepted" component as an absolute precondition to admissibility (by removing the term "recognized"). At the same time, however, the amendment emphasizes the continued requirement of reliability, and the continued gatekeeping responsibilities of the trial court. Effective January 1, 2004, MRE 702 will track closely the current language of FRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness had applied the principles and methods reliably to the facts of the case.

The trial court here, Judge Youngblood, refused even to conduct a MRE 702 analysis because defendants, as opponents of the evidence, did not prove a negative--that there were no scientific studies supporting the theories of plaintiff's causation expert, Dr. Gabriel (Appx 42a-43a, T 6: 17-18). In the words of this Court, this placement of the burden of proof by Judge Youngblood on the party opposing admission of the expert testimony is "patently incorrect," People v Young, 21, n 7:

As the previously recited line of unanimous precedent unequivocally

> demonstrates, the party offering novel scientific evidence has the burden of demonstrating general scientific acceptance for reliability among impartial and disinterested experts before the evidence may be admitted. [People v Young, 21, n 7.]

The Court of Appeals in its opinion in this matter, on the other hand, asserted that there was no need for an MRE 702 analysis because the scientific evidence of a Pitocin overdose and traumatic pounding on the "pelvic rim" was not "novel." (Appx 428a, slip opinion, opinion by Cooper, p 4). The Court's imposition of "novelty" as a precondition to the applicability of a MRE 702 analysis clearly is in error.

MRE 702 itself did not and does not now contain the term "novel." While "novel" scientific testimony must be subjected to a MRE 702 inquiry, see People v Young, supra, "novelty" certainly is not a precondition to MRE 702's application. Expert testimony must be subject to such an analysis where there is a legitimate issue raised as to whether its proponent can demonstrate its reliability, regardless of whether the opinion can be characterized as "novel". Old and established, "non-novel" scientific theory often eventually become no longer reliable as science evolves.

Moreover, defendants below here clearly did in fact make a preliminary showing both (1) that the causation theory asserted by Dr. Gabriel was in effect "novel," in that it was nowhere scientifically recognized, and (2) that it was unreliable, as having no support in scientific studies or literature and no support in the facts of this case. Once objection to the admissibility of Dr. Gabriel's causation testimony under MRE 702 was raised (Appx 33a-43a, T 6: 8-18, and again at Appx 106a-109a, T 13: 34-37), and Dr. Gabriel's own testimony demonstrated he was unable to point to scientific studies or knowledge supporting the application of his theory to the facts of this case, Judge Youngblood was obligated to ensure that that testimony met the requirements of MRE

702 before it was admitted. People v Young, supra.

2. Dr. Gabriel's causation theory of invisible, asymptomatic injury from trauma and compression caused by the pounding or grinding of the infant's skull against an indescribable bony structure in the mother caused by high uterine pressure was not scientifically reliable.

With the benefit of evidence and testimony from the lengthy malpractice trial, it is clear that Dr. Gabriel's testimony was not sufficiently reliable so as to permit its admission under MRE 702. When asked to identify any scientific studies or reports of such head trauma in a fetus severe enough to cause profound brain damage without any external signs of trauma at birth, Dr. Gabriel claimed such studies were performed and reported on in the 1950's and 1960's. However, Dr. Gabriel could not identify any journal or article in which these studies appeared (Appx 30a, Gabriel dep: 100). He also conceded that trauma had only been reported to occur in cases of cephalopelvic disproportion without a caesarian section, "malpositioning" of the fetus, or the use of forceps (none of which existed here) (Appx 15a, 26a-27a, Gabriel dep: 49-50, 90-91; Appx 197a-202a, Gabriel T 13: 126-131).

Dr. Gabriel conceded that no modern scientific text or literature describes this phenomenon. He speculated that this was because such injuries are now so rare, that there are not enough cases to study or report:

> Q Doctor, if we were to pick up a textbook of pediatric neology of neonatology today, would we found [sic] this phenomenon described?
>
> A Since it happens so rarely, I doubt it. It is not discussed anymore in modern literature because nobody would accumulate sufficient case studies to discuss it. Traumatic head injuries have essentially disappeared in the United States. It still occurs, and it's still the subject of considerable scrutiny when it does occur, but it's so rare as to be no longer a subject of basic data analysis. [Appx 30a-31a, Gabriel dep, 100-102, emphasis added.]

This explanation, and Dr. Gabriel's inability to name any article or studies supporting his claim, were repeated at trial, fully a year later (Appx 180a-185a, T 13: 109-114). Defense expert, Dr. Dombrowski, in contrast, affirmatively testified at trial there is no support in the literature for profound injury due to trauma when the child appears normal at birth (Appx 262a-263a, T 17: 48-49).

Further demonstrating the lack of reliability of Dr. Gabriel's testimony is the fact that he could not provide any data or scientific explanation with regard to how this pounding trauma (1) physically could or would have occurred (2) while leaving no visible impact on the child. Dr. Gabriel professed total and absolute ignorance of what areas of the anatomy of either the mother or the fetus were involved in this theoretical pounding, grinding process, or how they were involved. Demonstrating the unreliability of his testimony, was Dr. Gabriel's almost comic reluctance to discuss anything related to "a woman's pelvic region":

> Q Anyway, can you tell us on these pictures [of the maternal anatomy] where the pelvic outlet [against which the child's head allegedly was pounded] is?
>
> A Again, you're asking an obstetrical question and asking me to define the anatomy of a woman's pelvic region and I will not do that.
>
> Q Doctor, let's do it this way. Is the pelvic outlet against which this head was grinding, is it shown in either of these illustrations?
>
> A Same answer. I'm sorry I will not be drawn into the anatomy of a woman's pelvic region.***
>
> Q Well, could you please explain what the fetal head was grinding against in these illustrations of the anatomy?
>
> A In general, against the pelvic outlet, in particular I cannot get into maternal anatomy. That's simply not my field, I'm sorry. [Appx 233a-234a, T 13: 162-163.]

(See also Appx 14a-17a, Gabriel dep: 45-46, 52, 56-58; Appx 185a-187a, 201a-202a,

231a-236a, Gabriel T 13: 114-116, 130-131, 160-165.) Dr. Gabriel also could not explain how this pounding, grinding trauma could have happened where the child normally rotated within the uterus during labor, and easily fit through the birth canal given the child's size, and in the absence of any cephalopelvic disproportion; this, he complained, was an "obstetrical question." (Appx 202a, 234a, T 13: 131, 163.)

This "obstetrical question," however, was answered at trial by the obstetricians to whom Dr Gabriel thus deferred. Obstetricians, who unlike Dr. Gabriel were familiar with and willing to discuss female anatomy, provided positive and uncontradicted testimony that such invisible trauma by grinding or pounding against the mother's pelvis is anatomically impossible, given maternal and fetal anatomy in general.[3] (Appx 260a-271a, Dombrowski T 17: 46-49, 116-123; Appx 249a, 252a-255a, 256-258a, Bernal T 16: 17, 135-138, 186-188.)

Judge Youngblood's admission of this patently unreliable testimony into evidence was clear and palpable error. As in Nelson v American Sterilizer Co, 223 Mich App 485; 566 NW2d 671 (1997), there was shown by plaintiff no scientific literature supporting the existence of a causal connection between the type of contractions and delivery which occurred here, and silent, completely invisible and asymptomatic physical trauma to the

---

[3] Plaintiff's obstetrician, Dr. Gatewood, did not provide obstetrical testimony to support Dr. Gabriel's speculation. He never suggested that trauma from pounding against a bony protrusion was possible; he identified hypoxia due to compression of the cord or placenta as the only risk of injury presented by Pitocin. He described the pressure placed by contractions on the baby's head as "symmetrical." (Appx 83a, T 12: 23.)

It was undisputed that other kinds of, or visible trauma from other causes under circumstances not present here can occur. For example, where there is cephalopelvic disproportion, the fetus, who is too large for the pelvis, may sustain intracranial trauma due to resistance within the birth canal (but not due to pounding or grinding). There was no evidence or claim that this sort of traumatic injury occurred here (which would in any

brain. See also Amorello v Monsanto Corp, 186 Mich App 324, 332; 463 NW2d 487 (1990) (expert's testimony of a causal relation between PCBs and plaintiffs' medical problems inadmissible where plaintiffs failed to show either reasonable and reliable scientific basis, or support by scientific and medical literature), People v Hubbard, 209 Mich App 234, 242 n 2; 530 NW2d 130 (1995) (excluding drug profile evidence in the absence of sufficient foundation under MRE 702: "'Junk science' has no place in our courtrooms.")

In Checchio v Frankford Hospital, 717 A2d 1058 (Pa Super 1998), the Court applied these same principles under highly analogous circumstances to exclude as unreliable expert causation testimony purporting to link an infant's brain damage to treatment and events at labor and delivery. The experts in Checchio could not identify any documented scientific authority for their claim that the child's particular type of brain damage and retardation, of which he began exhibiting symptoms two years after birth, was caused by the child's respiratory distress at birth. Equally applicable here is the Court's analysis of the importance of the trial court's "gatekeeper" function:

> [U]nless the evidence on which the expert's testimony is based is deemed reliable, it should not be presented to the jury. . . . The reason is inherent in the rationale behind the use of expert testimony, which is that it must be helpful in elucidating matters of which the jury might remain ignorant. But if the testimony is not trustworthy from the outset, it can mislead, and by so doing undermine the truth determining process. The reliability quotient is set in Frye, and applied by the trial court, which does not, as we stated in Blum, "decide whether the propositions or theories are true or false. Rather the judge as gatekeeper decides whether the expert is offering sufficiently reliable, solid, trustworthy science. The question is: is the science good enough to serve as the basis for the jury's findings of fact, or is it dressed up to look good enough, but basically so untrustworthy that no finding of fact can properly be based on it. If the latter is true the integrity of the trial process would be tainted were the jury to consider it."

---

event be shown by other, visible damage to the child at the time of birth).

[717 A2d 1058, 1062.]

In Tanner v Westbrook, 174 F3d 542 (CA 5 1999), the federal Court of Appeals, applying Daubert and the reliability prong of Michigan's Davis/Frye test, found expert testimony analogous to that offered by Dr. Gabriel here regarding the cause of a child's brain injury to be insufficiently reliable and, therefore, inadmissible. There, the expert claimed that a child's cerebral palsy was caused by asphyxia during the birth process. The Court held that the proponent had failed to demonstrate that the testimony was reliable where the medical literature and defense experts established that birth asphyxia is rarely a cause of cerebral palsy, that a large proportion of cases of cerebral palsy remains unexplained, and that asphyxia severe enough to cause cerebral palsy would also cause other major organ damage (which was not present there, or here).

Clearly here, Dr. Gabriel's theory of invisible trauma was not shown to be sufficiently reliable. His "dressed up science" plainly was not "good enough," Checchio, supra, to serve as the basis for the jury's findings of fact.

C. The Testimony Of Plaintiff's Experts As To Both Breach And Causation Was Based On Facts Not In Evidence.

This Court, and the Court of Appeals, consistently have held that to be relevant, and to suffice to create a factual issue, an expert's opinion as to causation must be based on facts in evidence. "'[T]here must be facts in evidence to support the opinion testimony of an expert.'" Skinner v Square D Company, 445 Mich at 173, quoting DEC International v Mulholland 432 Mich 395, 411; 443 NW2d 340 (1989). Expert testimony which is premised on an assumption of facts which cannot be established is inadmissible. Green v Jerome Duncan Ford, Inc, 195 Mich App 493, 498; 491 NW2d 243 (1992), Thornhill v City of Detroit, 142 Mich App 656; 369 NW2d 871 (1985). If an

expert's opinion is based on the existence of several facts, the failure to establish any one in evidence renders the entire opinion "worthless as evidence." Thornton v Berry, 259 Mich 529, 531-532; 244 NW2d 152 (1932).

Effective September 1, 2003, the Court amended MRE 703 to explicitly provide that "the facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." This was not a new principle, but a clarification and codification of existing law. As observed by the Staff Comment, this modification "corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."

Ensuring that an expert's opinion testimony is based on facts in evidence is a critical component of the judiciary's "gatekeeping" function when dealing with expert testimony, either preliminarily as to its admissibility or ultimately as to its sufficiency to support a prima facie case. This principle was characterized by the United States Supreme Court in Daubert, supra, as a question of "fit"--"'whether the expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'"

The theories of plaintiff's experts as to causation and breach clearly did not "fit" the evidence in this case. Even assuming there was reliable science to establish that a Pitocin overdose could cause invisible traumatic injury, there were not sufficient facts in evidence to allow an expert or trier of fact reliability to conclude that was the cause of the injury in this case. There were not facts in evidence to support the hypothetical pyramid of events postulated by plaintiffs' experts--that the child's injury probably was

due to invisible trauma to the brain caused by an overdose of Pitocin, rather than one of the other myriad of possible causes of the type of brain damage and cerebral palsy from which Antonio Craig eventually was discovered to suffer. As the Court reasoned in Skinner in holding an expert's theory of causation was insufficient:

> Of course, the plaintiffs' offered scenario is a possibility. However, so are countless others. As explained above, causation that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment. [Skinner, 172-173.]

First, the assertion that there probably was an overdose of Pitocin through the simultaneous use of two, rather than one bag of IV fluid with Pitocin added was clearly only a hypothetical based on facts not in evidence. As set forth in detail by Oakwood Hospital in its brief before the Court, this theory was based solely on plaintiff's experts' speculation, based on one nurse's note inaccurately identifying which one of the two containers (IV bags) held the IV fluid with Pitocin and which held ordinary IV fluid. However, all other records, and testimony regarding staff habit and practice, clearly indicate that there was one bag to which Pitocin was added, and labeled as such, that one bag would have been run through one "IVAC" (a monitor/regulator that allows for delivery of precise, measured doses), and that the doses recorded were within normal limits (See Appx 171a, Gatewood T 11: 88; Appx 242a-1-242a-5, Gennaoui T 14, pp 115-119; Appx 46a-50a, medical records). Further, although contractions caused by a Pitocin overdose of the nature hypothesized by plaintiff's experts would be "horrible, causing "extremely intense" pain in the mother (Appx 64a, Gatewood T 10: 190), there was no indication of such discomfort in the medical records, and plaintiff's counsel chose not to call Ms. Craig at all to testify.

Second, there were not facts in evidence to support the claimed existence of

severe, intense and prolonged contractions, or of the allegedly resulting high uterine pressures (which Dr. Gabriel claimed in turn caused the pounding or grinding, and high venous pressures). The medical records reflect that upon physical palpitation the contractions were always mild to moderate throughout the labor. Such physical palpitation is an accepted and accurate means of measuring the strength of contractions as an alternative to an internal contraction monitor (Appx 46a-50a, medical records; Appx 66a-71a, 82a-82a-1, 84a, Gatewood T 11: 83-88, T 12: 9-10, 58; Appx 240a, Gennaoui T 14: 94).

Dr. Gabriel initially based his conclusion that there had been high uterine pressures on the recordings from the contraction monitor, which he assumed "do in fact reflect high uterine pressures evidently." However, Dr. Gabriel conceded he actually had no idea what the contraction monitor specifically measured (Appx 174a-175a, 236a-237a, T 13: 103-104, 165-166). Those experts who did possess that knowledge, including Dr. Gatewood, agreed that this type of monitor could not and did not measure internal uterine pressures, or the strength of contractions, because it was an external monitor which measures only the number and duration of contractions (Appx 61a, 63a, 79a-80a, Gatewood T 10: 145, 178, T 11: 207-208; Appx 244a-244a-1, Bernal T 15: 236-237; Appx 238a-239a, Gennaoui T 14: 83-84). (Indeed, it was the absence of an internal contraction monitor, an intrauterine pressure gauge monitor, which was criticized by Dr. Gatewood precisely because internal uterine pressures could not be measured or monitored (Appx 54a-55a, Gatewood T 10: 81-82).)

Third, there were no facts in evidence to establish the existence of a "bony protrusion" against which Dr. Gabriel hypothesized the child's skull could and would

have pounded or grinded. As detailed above, Dr. Gabriel could not identify this bony protrusion, and deferred to obstetricians. Those obstetricians to whom he deferred testified that anatomically there is no bony structure against which the child can be injured by pounding or grinding (Appx 247a-258a, Bernal T 16: 15-17, 135-137, 186-188).

Further, those same obstetricians established that this theory of pounding, grinding trauma was inconsistent with the underlying facts regarding this particular labor. Such injury was inconsistent with the easy and normal positioning, rotation, and passage of this fetus during this birth process (Appx 265a-271a, Dombrowski T 17: 117-123). The child was normally positioned: he began in the right occiput posterior position (as do at least one in five babies). Because of his small size, he rotated easily and normally to the left occiput and anterior position before engaging in and descending the birth canal (Appx 74a, Gatewood T 11: 154; Appx 247a-252a, Bernal T 16: 15-19). Indeed, Dr. Gatewood declared that any signs of fetal head compression as reflected by the fetal monitor strips were reassuring from the obstetrician's standpoint, and not cause for concern or action (Appx 76a, 83a, T 11: 200, T 12: 23).

Fourth, there was no evidence of any resulting or concurrent physical trauma to the child's head from striking a bony protrusion (or anything else). There was no evidence of physical trauma or injury such as bruising, bleeding, or unusual molding of the head; the child appeared healthy at birth (Appx 80a, Gatewood T 11: 208; Appx 193a, 197a-202a, Gabriel T 13: 122, 126-131). On the other hand, defense witnesses testified to the obvious--that without any sign of trauma at birth it is impossible to have trauma so severe as to cause the brain damage with which this child eventually was

diagnosed (e.g., Appx 273a-274a, subsequent treater Nigro: T 22: 113-114).

An expert's causation opinion premised on nonexistent facts is insufficient to create an issue of fact for the jury. Badalamenti v William Beaumont Hospital, 227 Mich App 278; 602 NW2d 854 (1999), Thornhill v City of Detroit, 142 Mich App 656, 661; 369 NW2d 871 (1995), Green v Jerome-Duncan Ford, 195 Mich App 493, 499; 491 NW2d 243 (1992), Skinner, supra. Dr. Gabriel's ignorance of anatomy in general and of the significance of the ease with which this child was delivered here rendered his opinion one of pure speculation. "[O]pinion testimony based on assumptions rather than on facts established by proof may not be given the effect of outweighing positive testimony." Wyatt v Chosay, 330 Mich 661, 671; 48 NW2d 195 (1951).

In Skinner this Court held that assertions by an expert that an electrocution was caused by the defendant's product (a switch) was insufficient to create an issue of fact because the theory as to how the accident had occurred was "premised on mere suppositions" and "lacked a basis in established fact." Skinner, 174. Applicable here by direct analogy is the Court's reasoning in Skinner, 173-174:

> Plaintiffs' expert testimony did not sufficiently establish causation. Plaintiffs' experts maintained that the switch was defective, and that the defect was the proximate cause of the decedent's death. The experts' causation theories were deficient, however, because each lacked a basis in established fact. Specifically, each expert either assumed, or was asked to assume, that (somehow) the wires were unhooked, and that the power was on when Mr. Skinner began working on the machine. Because the experts' conclusions regarding causation are premised on mere suppositions, they did not establish an authentic issue of causation.

As in Skinner, 171 "the plaintiff's circumstantial evidence here did not afford a reliable basis from which reasonable minds could infer that, more probably than not, but for" the alleged malpractice, Antonio Craig would not have been brain damaged.

In Green v Jerome-Duncan Ford, the plaintiff's expert made various calculations

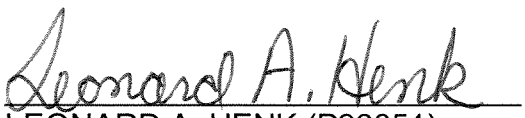
to conclude that brakes had locked up (which he claimed was due to a manufacturing defect). This opinion was inconsistent with witness observations. "When questioned about these inconsistencies [the expert] was not able to reconcile them other than by disparaging the witnesses' powers of observation." Green, 500. The Court struck the expert's testimony and granted summary disposition. As in both Skinner and Green, Dr. Gabriel's testimony was inconsistent with or certainly not supported by the underlying facts, and thus insufficient to create an issue of fact.

RELIEF REQUESTED

WHEREFORE, defendant Henry Ford Health System respectfully requests that this Court issue a decision vacating the judgment and dismissing this case as to Henry Ford Health System, there being no basis for any "successor liability". Further, in the alternative, defendant requests that this Court vacate the judgment and grant JNOV or at a minimum, a new trial and further, that any remedy as to codefendant, Dr. Gennaoui, not inconsistent with the above stated requested relief, inure to Henry Ford Health System.

Respectfully submitted,

KALLAS & HENK, P.C.



LEONARD A. HENK (P26651)
Attorney for Henry Ford Health System
43902 Woodward Avenue
Suite 200
Bloomfield Hills, MI 48202-0556
(248) 335-5450 Ext 229

Respectfully submitted,

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

SUSAN HEALY ZITTERMAN (P33392)
Co-Counsel for Henry Ford Health System
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226
(313) 965-7905

DATED: NOVEMBER 7, 2003